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In the

Supreme Court of the United States

OCTOBER TERM, 1951

No. 596

SOUTHWEST STONE COMPANY,
Petitioner,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Date: February 15, 1952.

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WARLICK LAW PRINTING COMPANY — *Law Brief Printing* — Dallas — HArwood-9350

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The Southwest Stone Company, appellant below in No. 13605, *Southwest Stone Company v. Missouri-Kansas-Texas Railroad Company*, prays that a writ of certiorari be issued to review the judgment entered in this case on November 30, 1951, by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The district court did not render an opinion. The opinion of the Court of Appeals (R. 170-175) is reported at *192 F. 2d 395.*

JURISDICTION

The Federal District Court had original jurisdiction because the controversy arose under an act of Congress regulating interstate commerce *(28 U. S. C. A. 1337)*. The Court of Appeals for the Fifth Circuit had jurisdiction of the appeal under *28 U. S. C. A. 1294 (1)*. This court has jurisdiction under *28 U. S. C. A. 1254*. This petition is filed within the time provided in *28 U. S. C. A. 2101 (c)*.

QUESTIONS PRESENTED

(a) May a railroad company charge a consignor demurrage on cars held on its storage tracks with the intention of later placing them in a position accessible for loading or at a point previously designated by the consignor?

(b) In a demurrage suit, where there is a dispute between the parties as to the point designated by the shipper for the placement of the cars, may the trial court receive carrier's evidence and reject the shipper's evidence on that point?

(c) In 1937 a shipper in writing designated a spot where all cars were to be placed for loading. The carrier in writing agreed that on all future orders it would be understood that this spot was designated. Thereafter the shipper

did not specify each time a car was ordered that it be placed at this precise spot. Is the Appellate Court justified in affirming a judgment for the carrier on the ground that the written agreement was irrelevant since the shipper failed to designate such spot each time a car was ordered?

(d) In 1923, a carrier entered into an arrangement with a shipper whereby the shipper would construct additional trackage near its plant, which the railroad would use as storage tracks. These tracks were for the use of the carrier. The arrangement contemplated that cars placed on these storage tracks would be under the control of the carrier and would not be considered cars furnished the shipper until cars were actually appropriated by the shipper. After the agreement had been in effect for thirty years the carrier began assessing demurrage on cars from the time same were placed on the storage tracks. Under such circumstances, is the trial court justified in rejecting evidence of the existence of such agreement and is the Appellate Court justified in affirming judgment for the carrier when such agreement was not permitted to be proved?

STATUTES AND REGULATIONS INVOLVED

Section 6 of the Interstate Commerce Act (49 U. S. C. A. 6) provides that railroads must assess charges in accordance with tariffs published and filed with the Interstate Commerce Commission. The pertinent provisions of the applicable freight tariff are shown in Appendix A herein.

STATEMENT

The Missouri-Kansas-Texas Railroad Company sued the Southwest Stone Company, a shipper of crushed stone, for demurrage accruing on empty cars while being held on railroad storage tracks constructed by both parties under an agreement made thirty years ago for the purpose of enabling the railroad company to supply cars needed by the stone company with less operating expense. None of the cars on which demurrage was claimed was placed in a position accessible for loading or at the place previously designated by the shipper for loading.

The case was tried to a jury. Railroad witnesses testified that the tracks on which the cars were placed were not "storage tracks" and that the cars had been placed for loading. The trial court rejected shipper evidence that the tracks were railroad storage tracks, that they had been constructed under a mutual agreement for the benefit of both parties, that they had been so used without question for nearly thirty years, and that none of the cars had been placed in a position accessible for loading or at a spot previously designated by shipper. The rejected evidence included written admissions by the railroad that the tracks on which the cars were placed were "storage tracks" and that the shipper had designated a point of placement other than that where the cars were held for storage.

The trial court charged the jury that the applicable freight tariff authorizes the railroad company to charge demurrage on cars placed "on a lead track, a track that

could be used for getting the car to the particular loading bin, just so it was amenable to the desires, and, intentions, and, purposes of the shipper."

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that defendant alleged that no demurrage accrued after cars were placed at point designated.

2. In holding that appellant presented only two grounds for reversal.

3. In holding that the undisputed evidence shows that orders for cars were given orally.

4. In holding that letters tendered as defendant's exhibits 1, 2 and 4 had no relevancy in this proceeding.

5. In holding that the court's charge was not erroneous and was fair to appellant.

6. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

Neither this court nor the Circuit Court for the Fifth Circuit has ever decided the precise questions of law involved in this proceeding, so far as we can find. The Circuit Court for the Ninth Circuit and a District Court in the Sixth Circuit have recently decided the precise questions directly contrary to the decision of the Fifth Circuit Court in this case.

In *Pacific Portland Cement Company v. Western Pacific Railroad, 184 F. (2) 34, Cert. denied 340 U. S. 906,* the Court of Appeals for the Ninth Circuit held that demurrage was not collectible. The facts were on all fours with the facts in this case. There the storage tracks were constructed and maintained by the shipper. Under an arrangement entered into in 1926, in order to relieve congestion in the railroad yards, shipper removed empty cars from railroad yards with its own switch engine and placed them on storage tracks belonging to shipper. The court held that demurrage time did not begin running until the cars were later "appropriated" for loading and moved from the storage tracks. The demurrage tariff applicable there was the same tariff as applicable in this case. The arrangement made in 1926 for the mutual benefit of the railroad and the shipper was considered of great importance.

In *Southern Railway Company v. Aluminum Company of America* (R. 187), not yet reported, a District Court in the Sixth Circuit held that demurrage was not collectible under facts very similar to those in the *Pacific Portland Cement Case.* There, also, the applicable demurrage tariff was the same tariff as applicable here. The Aluminum Company constructed on its own property and at its own expense adequate track facilities for the marshalling and sorting of cars preparatory to spotting them for loading and unloading. Those yards were used by the railroad as an assembly or storage yard. From 1921 to 1946 demurrage time was computed from the time the cars were

"appropriated" or removed from the storage tracks to be taken to loading points. Then the railroad changed its mind and tried to apply the tariff as applied by the M-K-T Railroad Company in this case. The court said the prior interpretation was correct. So far as we know, no appeal was taken in that case.

In *Southwest Stone Company v. Missouri-Kansas-Texas Railroad Company*, the case at bar, the circuit court for the Fifth Circuit held that the agreement entered into in 1923 under which both the railroad and the shipper constructed track facilities for marshalling and storing cars was irrevelant; that the designation of a point where cars were to be placed for unloading in accordance with Rule 3 was irrevelant; and that the admission in Defendant's Ex. 2 (R. 173) that the tracks on which the cars were stored, and where demurrage accrued, were "storage tracks "was irrelevant. It further held that the trial court's charge to the jury was not erroneous though the charge indicated that demurrage could be assessed on cars held in a railroad assembly or storage yard and even on a lead track. (R. 175.)

In the *Pacific Portland Cement Case* the railroad sued for more than $63,000. In the *Aluminum Company Case* the railroad sued for nearly $100,000. In this case suit was filed for less than $500. Only a few cars stored in three widely separated months were included. If the principle can be established on a few cars, suits for much larger sums will follow. Important questions of law and large sums of money are involved. If the Sixth and Ninth Cir-

cuit decisions are right, the Fifth Circuit decision is wrong. This court should settle the question for the benefit of the shippers throughout the United States.

SUMMARY OF FACTS HELD TO BE IRRELEVANT

Oral and documentary evidence showing the following facts was tendered and rejected by the trial court. The Circuit Court held that it has no relevancy in this case. (R. 175.)

In 1923 the railroad and the shipper at Stringtown, Okla., entered into an arrangement under which tracks shown on map at page 161 of the record were constructed for the mutual benefit of both parties. These tracks were to be used as storage tracks for cars preparatory for spotting and loading when required by shipper. They were so recognized in writing by the railroad. (R. 173.) In accordance with the provisions of Rule 3 of the applicable tariff, the shipper designated the point where these cars were to be placed for loading. (R. 77.) These tracks were constructed to prevent the railroad having to store excess cars at Atoka, Okla., eight miles distant from Stringtown, and move them up by local freight service each day.

As a condition precedent to the execution of the average agreement on which the railroad relied, it was agreed between the railroad and the shipper that the shipper had previously designated the loading bins as the point at which cars should be placed for loading and that demurrage time would be computed from the time that cars are so placed or "from the time you pull them off the storage

track and begin to load." See Defendant's Exhibits 1 and 2 (R. 77 and 79). It was understood between the parties that this agreement should be a part of the Average Agreement shown in Plaintiff's Exhibit 3 on page 41 of the record. The trial court accepted Plaintiff's Ex. 3 but rejected Defendant's Ex. 1 and 2.

For nearly thirty years the agreement shown in Defendant's Ex. 1 and 2 was followed in computing demurrage on cars held on the lead track and the four storage tracks shown on map at page 161 of the record. Demurrage time was computed from the time the cars were placed under the loading bins or from the time when cars were pulled from the storage tracks. In January, July and September, 1950, the railroad attempted to compute the time from the hour and date the cars were placed on the storage tracks and claimed that it had erred in the custom and practice followed from 1923 through 1949.

SUMMARY OF FACTS ADMITTED IN EVIDENCE

The Southwest Stone Company operates a stone quarry at Stringtown, Okla. (R. 118.) About 1920 that company negotiated a contract with the Missouri-Kansas-Texas Railroad Company with respect to constructing additional trackage (R. 120). Testimony as to details was not admitted. The present trackage arrangements are depicted on map reflected at page 161 of the record. The four tracks between the respective switches are called storage tracks and are used for storage by the railroad. (R. 122.)

Stringtown, Okla., is a small place. If the railroad has more cars than can be stored on the four storage tracks, they are held at Atoka, Okla., eight miles south of Stringtown (R. 131). There is one train a day from Atoka to Stringtown (R. 132). When the cars arrive at Stringtown, they are placed on the lead track to be cleaned by the section crew. Most of the time the local runs late and the section crew goes home before the cars are set out on the lead track. After cleaning, they are classified into five or six classes. (R. 132.)

After being placed on the storage tracks the cars are still considered the railroad's cars until they are dropped down under the bin for loading. (R. 133.) From time to time the railroad places cars on those storage tracks which the shipper is not permitted to load. Those cars are dropped through without loading and removed by the railroad for loading at other points. The cars placed on those storage tracks exceed the daily requirements of the shipper. (R. 134.) When eight cars of a certain type are needed, the railroad sometimes places twenty or thirty cars of that type on the storage tracks. (R. 135.) The railroad does not maintain a switch engine at Stringtown, Okla. (R. 136.) The Southwest Stone Company has twelve loading bins at Stringtown and it requires about five minutes to load a car from one of those bins. (R. 139.) Three cars can be loaded at one time (R. 143).

Quite often cars in excess of the number which the shipper expects to load are placed on the four storage tracks shown on map at page 161 of the record (R. 151). Some

of the cars are taken out by the railroad before they are loaded by the shipper. They come in and pull them off of the storage tracks. With the exception of T. & P. ballast cars, the local superintendent usually telephones the railroad agent how many cars he expects to load next day but the railroad frequently places more cars than that on the storage tracks. No information is ever furnished as to the number of T. & P. ballast cars that may be loaded (R. 151).

The length of the several tracks used by the railroad is shown below:

Lead Track	2,000 ft.
Track No. 1	1,403½ ft.
Track No. 2	3,694 ft.
Track No. 3	3,260½ ft.
Track No. 4	1,437.4 ft.

(R. 30 and 161.)

The loading bins (designated as the point of placement) are approximately 150 feet south of the storage tracks (R. 30).

Under the present emergency, the demurrage applicable on cars held for loading under the average agreement is as follows:

First day	$ 5.00 per car
Second day	5.00 per car
Third day	10.00 per car
Fourth day	10.00 per car
Each succeeding day	20.00 per car

Charges beyond the second day shall not be offset or reduced by accrued credits (R. 52).

Demurrage time on the cars involved herein was computed from the hour and date the cars were placed on Tracks 1, 2, 3 and 4 (R. 10-17 and 70).

While two witnesses for the railroad testified that cars were not placed on Tracks 1, 2, 3 and 4 until they had been ordered, *Witness Rich* admitted on cross examination that T. & P. ballast cars were never ordered and the first he knew about them was when they arrived at the station. *Witness Rich* was local agent for the railroad and he testified that he knew those cars had not been ordered (R. 104). Yet they were placed on Tracks 1, 2, 3 and 4 on arrival. (R. 71.)

Cars were first placed on the lead track and cleaned. They were then placed on Tracks 1, 2, 3 and 4. The M-K-T Railroad has no other storage track at Stringtown (R. 106). On occasions the shipper pulled cars off of the lead track with a Caterpillar tractor. (R. 108.) At other times more cars are placed on the lead track and Tracks 1, 2, 3 and 4 than the shipper indicated he expected to load. They remain on those tracks sometime before they are needed (R. 151).

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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FRANK A. LEFFINGWELL,
Attorneys for Petitioner.

Date: February 15, 1952.
Address: 1515 Praetorian Building,
Dallas 1, Texas.

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of this petition to Mr. O. O. Touchstone, attorney for the appellee, at his offices in the Southland Life Building, Dallas, Texas. I further certify that he has already been furnished with a copy of the transcript of record, a copy of the decision of November 30, 1951, by the Court of Appeals, a copy of appellant's motion for rehearing December 19, 1951, and a copy of the order of January 7, 1952, denying such rehearing.

Witness my hand this the 15th day of February, 1952.

.....

FRANK A. LEFFINGWELL,
Of Counsel.